

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ROBERTA ZIMMER</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 204,292
<b>CENTRAL KANSAS MEDICAL CENTER</b>	)	
Respondent	)	
AND	)	
	)	
<b>SEDGWICK JAMES OF MISSOURI</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appeals from an Award entered by Administrative Law Judge Bruce E. Moore on October 23, 1996.

**APPEARANCES**

Claimant appeared by her attorney, M. John Carpenter of Great Bend, Kansas. Respondent and its insurance carrier appeared by their attorney, Richard A. Boeckman of Great Bend, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and adopted the stipulations listed in the Award. The Board has also considered the report of the court ordered independent medical examination done by Dr. Terrance C. Tisdale.

**ISSUES**

The sole issue on appeal is the nature and extent of claimant's disability. The key questions are as follows:

- (1) Did claimant suffer permanent aggravation or additional injury to her left shoulder or low back?
- (2) Was the work respondent offered after the injury work which claimant was capable of performing?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the record, the Appeals Board concludes the Award of a 16 percent work disability should be modified to an award for a 32 percent work disability.

#### **Findings of Fact**

1. Before the injury involved in this claim, claimant suffered a number of injuries in the course of her employment for respondent. These included injury to the low back and to the left shoulder. The prior injuries were treated by, among others, Dr. C. Reiff Brown and Dr. J. Mark Melhorn. The treatment included surgery for torn rotator cuff in the left shoulder. On February 22, 1995, claimant settled claims on those prior injuries. The settlement was based on a 7 percent body as a whole rating for the low back, a rating by Dr. Brown, and a left shoulder rating of 20 percent, converted to 12 percent of the body, a rating by Dr. Melhorn.
2. At the time of the prior injuries, claimant worked for respondent as a nurse's aide. When she returned to work after the last injury, a shoulder injury, respondent assigned her as a dietary or food service aide, in a position in the dish room. In the dish room, claimant put dishes on the rack of a dishwashing machine and scrubbed pots and pans. Claimant first worked 40 hours per week in the dish room but, because of pain she was having, asked that the hours be reduced to a 4-day, 32-hour, work week.
3. On April 11, 1995, while working a four-day week, claimant began having severe pain in both shoulders and her back. Claimant reported the problem, and respondent referred her for medical treatment. Dr. Melhorn diagnosed bilateral carpal tunnel syndrome. Claimant continued to work until she underwent surgery by Dr. Melhorn for carpal tunnel syndrome on the right August 21, 1995, and on the left September 6, 1995.
4. Respondent terminated claimant's employment by letter dated August 30, 1995. The letter indicates it has been necessary to assign most of claimant's duties to other employees and, as a result, her position is no longer necessary. The letter also indicates claimant is free to apply for work with respondent in the future but does not guarantee she will be employed.

5. Dr. Melhorn rated the impairment as 7.8 percent impairment of each arm, ratings which he converted to 10 percent of the body as a whole. The body as a whole rating was rounded up, according to Dr. Melhorn, to account for increased shoulder complaints. Dr. Melhorn apportioned the total 10 percent impairment, first stating in his deposition that 40 percent of this impairment preexisted the April 11, 1995, accident and then, upon cross-examination stated he might change that opinion to 35 percent preexisting. Dr. Melhorn also testified that claimant noted pain in the low back on a white drawing done July 3, 1995, but did not on white drawings done July 17, 1995 or October 12, 1995, and, except for the July 3, 1995, white drawing, did not mention or complain of her low back. Claimant did make complaints of pain in the left shoulder. As restrictions, Dr. Melhorn recommended claimant be limited to medium level work as defined by OSHA with maximum lift of 50 pounds, frequent lift of 25 pounds, and hand over shoulder work limited to 2 hours or less in an 8-hour workday. Dr. Melhorn released claimant to return to work on October 26, 1995.

6. Respondent offered claimant accommodated employment in a letter dated January 10, 1996, to respondent's counsel. Claimant declined the offer. Respondent extended the offer through February of 1996 but claimant, again, declined the offer. The offer was for a position as food service aide working 27 hours per week.

7. Claimant testified she declined the offer because of continuing problems with her back and shoulders. She also declined the offer because the work offered was essentially the same work she had been doing at the time of her injury. Claimant did not feel she could reach above shoulder level to put away the dishes or that she could scrub and clean pots and pans.

8. At the time of the regular hearing claimant was working 20 hours per week, at \$5.00 per hour, supervising housecleaning and doing some light tasks. The weekly wage for this job paid 33 percent less than the \$149.08 claimant was earning at the time of the injury. She had also returned to school, studying office technology at a community college. Claimant had applied for work as a facility aide in nursing homes, as a cashier at McDonald's and Food 4 Less, and at Woodhaven Care Center for a job in laundry.

9. On March 13, 1996, Dr. C. Reiff Brown examined claimant at the request of claimant's attorney. He concluded claimant's low back injury resulted in a 3 percent general body impairment in addition to the preexisting 7 percent. According to Dr. Brown, claimant has 10 percent permanent partial impairment of each arm as a result of the carpal tunnel syndrome. Finally, he concluded claimant has 2 percent impairment of the right arm as a result of biceps and rotator cuff tendinitis and 5 percent impairment of the left arm as a result of residual difficulties with the left shoulder. Dr. Brown combined the various individual impairment ratings to arrive at a 19 percent general body impairment.

10. Dr. Brown also recommended restrictions. He stated claimant should do the following: (1) limit lifting to 50 pounds for occasional lifting and 25 pounds for frequent

lifting; (2) use proper body mechanics for lifting any weight; (3) avoid frequent flexion of the lumbar spine; (4) avoid use of hands above shoulder level; (5) limit occasional lifting above shoulder level to no more than 5 pounds; (6) avoid frequent use of hands at waist level through a range that would require movement of hands away from body more than 18 inches in any direction; and, (7) avoid frequent grasp and flexion and extension with the wrist.

11. Dr. Brown reviewed a list of the tasks claimant had performed during the 15 years before the date of accident and concluded claimant was unable to perform 56 percent of the tasks she performed during that 15 years. The loss included a loss of 46 percent of the tasks she was performing in the food service aide job she was doing at the time of the accident. Dr. Brown is the only physician who gave an opinion of the task loss. For the nurse aide job claimant performed, Dr. Brown testified claimant lost 2 of the 15 tasks due to the present injury. It was, therefore, Dr. Brown's opinion that claimant lost the ability to perform 9 of the total 29, or 31 percent, of the tasks as a result of the carpal tunnel syndrome.

12. Dr. Terrance C. Tisdale performed an independent medical examination at the request of the ALJ. He found 10 percent impairment to each upper extremity for the carpal tunnel syndrome, 7 percent to the body as a whole for the low back impairment, and 7 percent impairment to the left shoulder. He combined the ratings to arrive at a total of 21 percent impairment to the body as a whole. For the back injury, he recommended claimant be limited to lifting 50 pounds occasionally and 25 pounds frequently. Dr. Tisdale also recommended she avoid repetitive bending, awkward positions and maintaining a single posture for extended periods of time. For the shoulder, he recommended she restrict reaching in front of her with jobs that require she move her hands away from the body. For the carpal tunnel, he recommended that she avoid repetitive motion jobs and avoid impact or vibratory tools that require strenuous use of the hands.

13. The Board agrees with and affirms the finding by the ALJ that claimant suffered no additional permanent injury to the left shoulder or back attributable to the April 11, 1995 accident. The Board so finds for the same reasons given by the ALJ.

14. The Board finds, however, the job offered by respondent after claimant's carpal tunnel surgery was not a job claimant could perform. This finding is based on claimant's testimony and the opinion of Dr. Brown that claimant could not do 7 of the 15 tasks in the job she was doing April 1995, essentially the same job she was offered after the carpal tunnel surgery. The record contains no medical opinion that claimant could do the job.

### **Conclusions of Law**

1. K.S.A. 44-510e(a) sets out the statutory definition of permanent partial general disability and an injured employee's entitlement to the same:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

2. K.S.A. 44-510e also provides that a claimant who earns a wage 90 percent or greater than his/her pre-injury wage is limited to the disability based on functional impairment.

3. The Kansas Court of Appeals has held that a claimant who is offered a job with a wage comparable to the pre-injury wage may not benefit from refusing to even attempt that job. The wage will be imputed to claimant and the award will be limited to functional impairment. Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

4. A claimant who loses his or her job must make a good faith effort to find employment. If the claimant fails to do so, the wage factor used in the work disability test will not be based on actual wage loss. A reasonable wage will be imputed to the claimant and the wage loss calculated from that imputed wage. Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

5. The Board finds claimant did not refuse a job she could perform. As indicated above, the Board does not consider the offered job to be one she could perform.

6. The Board also finds claimant made a good faith effort to find employment after the injury at issue here.

7. Claimant is entitled to work disability based on the average of her task loss and her actual wage loss. The task loss was 31 percent and the actual wage loss was 33 percent. Claimant, therefore, has a work disability of 32 percent.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore, dated October 23, 1996, should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Roberta Zimmer, and against the respondent, Central Kansas Medical Center, and its insurance carrier, Sedgwick James of Missouri, for an accidental injury which occurred April 11, 1995, and based upon an average weekly wage of \$149.08, for 9.57 weeks of temporary total disability compensation at the rate of \$99.39 per week or \$951.16, followed by 132.8 weeks at the rate of \$99.39 per week or \$13,198.99 for a 32% permanent partial general disability, making a total award of \$14,150.15, which is presently due and owing in one lump sum, less amounts previously paid.

The Appeals Board approves and adopts all other orders by the ALJ not inconsistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: M. John Carpenter, Great Bend, KS  
Richard A. Boeckman, Great Bend, KS  
Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Director